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No. 617

IN THE

Supreme Court of the United States

UNITED FUEL GAS COMPANY, a corporation,
Appellant,

v.

CHARLES H. HADEN, II,
TAX COMMISSIONER OF WEST VIRGINIA,
Appellee

UPON APPEAL FROM THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

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September 17, 1969

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No. _____

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v.

CHARLES H. HADEN, II,
TAX COMMISSIONER OF WEST VIRGINIA,
Appellee

UPON APPEAL FROM THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

Appellant, hereinafter referred to as United Fuel, appeals from the judgment of the Supreme Court of Appeals of the State of West Virginia entered April 3, 1969, which said judgment subsequently became final when the Supreme Court of Appeals of West Virginia refused United Fuel's petition for rehearing by order entered June 24, 1969. Said final judgment reversed the judgment of the Circuit Court of Kanawha County, West Virginia, insofar as the same was pertinent to this appeal.

This appeal is limited to that part of said final judgment of the Supreme Court of Appeals of the State of West Virginia that holds that United Fuel's mainline industrial sales of natural gas to E. I. du Pont de Nemours and Company, Elk Refining Company, and Kaiser Aluminum and Chemical Corporation, are not

interstate commerce. United Fuel submits this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

(a) THE OPINIONS BELOW

The opinions of the Supreme Court of Appeals of the State of West Virginia are not yet officially reported. The opinion by Haymond, Judge, which is the dissenting opinion on the questions raised in this appeal (but the majority opinion on all other questions), is unofficially reported in 167 S.E.2d 890-920. The opinion by Calhoun, Judge, which is the majority opinion on the questions raised by this appeal, is unofficially reported in 167 S.E.2d 920-25. Attached hereto in Appendix A are (1) the opinion by Haymond, Judge, at pages 1a-65a; (2) the opinion by Calhoun, Judge, at pages 66a-77a; (3) the judgment, entered April 3, 1969, at pages 78a-79a; and (4) the order refusing United Fuel's petition for rehearing, entered June 24, 1969, at page 80a.

The opinion of the Circuit Court of Kanawha County, West Virginia, is not to be reported. It is attached hereto as Part Five of Appendix A, at pages 81a-136a.

(b) GROUNDS ON WHICH JURISDICTION IS INVOKED

(i) This appeal is to set aside a judgment for gross receipts privilege taxes assessed under the provisions of W. VA. CODE, c. 11, art. 13, §§ 2 and 2-d, as amended from time to time (see paragraph (v), *infra*, p. 3), on the ground that such assessment is invalid under the Commerce Clause of Article I, Section 8 of the Constitution of the United States. The proceeding was originally brought by United Fuel under the provisions of

W. VA. CODE, c. 11, art. 13, § 8, as amended by W. VA. ACTS 1963, c. 182.

(ii) The judgment sought to be reviewed was dated and entered April 3, 1969. The order refusing United Fuel's petition for rehearing was entered June 24, 1969. United Fuel's Notice of Appeal was filed September 8, 1969, in the Circuit Court of Kanawha County, West Virginia.

(iii) 28 U.S.C. § 1257(2) is the statute which confers jurisdiction on this Court to hear the appeal.

(iv) The cases which sustain the Court's jurisdiction are *Allied Stores, Inc. v. Bowers,* 358 U.S. 522 (1959); *Staub v. City of Baxley,* 355 U.S. 313 (1958); *Cole v. Arkansas,* 333 U.S. 196 (1948); *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69 (1946); *Market Street Ry. v. Railroad Commission,* 324 U.S. 548 (1945); *Cole v. Violette,* 319 U.S. 581 (1943); *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1930); *Missouri ex rel. Missouri Insurance Co. v. Gehner,* 281 U.S. 313 (1930); *Chicago Great Western R. R. v. Basham,* 249 U.S. 164 (1919); *Saunders v. Shaw,* 244 U.S. 317 (1917); *Rio Grande Western Ry. v. Stringham,* 239 U.S. 44 (1915); and *Mower v. Fletcher,* 114 U.S. 127 (1885).

(v) W. VA. CODE, c. 11, art. 13, §§ 1, 2, 2-d, 3-a, 3-b, 7, 7-b, and 8, as amended and effective for the purposes of this proceeding, are set forth in Appendix B.

(c) QUESTIONS PRESENTED BY THIS APPEAL

1. Did the Supreme Court of Appeals of the State of West Virginia err in holding that United Fuel's main-line industrial sales of Southwest and Kentucky gas to E. I. du Pont de Nemours and Company, Elk Refining Company, and Kaiser Aluminum and Chemical Corporation, pursuant to certificates of convenience and neces-

sity issued by the Federal Power Commission under Section 7(c) of the Natural Gas Act (15 U.S.C.A. § 717f(c)), are not transactions in interstate commerce?

2. Does the Commerce Clause of U. S. CONST., art. I, § 8 forbid the State of West Virginia to tax United Fuel's mainline industrial sales of Southwest and Kentucky gas by imposition of a privilege tax measured by the seller's gross receipts from such sales?

(d) STATEMENT OF THE CASE

This case involves the Business and Occupation Tax of West Virginia, which is a privilege tax (W. VA. CODE, c. 11, art. 13, § 2). Applied to the facts at bar, it is a tax on the privilege of doing business as a public utility, measured by the gross income from the "supplying of public services" without deductions on account of any expenses except a small tax credit (W. VA. CODE, c. 11, art. 13, § 2-d).

The General Background of United Fuel Gas Company

United Fuel is a West Virginia corporation, authorized to do business in West Virginia, Kentucky, Louisiana, Ohio, and Virginia (R. 87-89),* and principally engaged in the production, purchase, transmission, distribution,

* This case was submitted to the trial court on stipulation. A narrative stipulation accounts for the bulk of the record that was printed for proceedings below, which printed material has been filed (in lieu of the many separate documents in typescript) on this appeal, by agreement of counsel. Citations to this narrative stipulation and other material printed below are to the printed record ("R") page.

The stipulated exhibits were never printed. Instead, they were photocopied or otherwise duplicated in eight volumes. Citations to Stipulation Exhibits 1 through 131 are by reference to "X" for "Exhibit", plus the identifying number. Citations to Stipulation Map Exhibits 132 through 159 are by reference to "MX" for "Map Exhibit", plus the identifying number.

Copies of record documents that became of record *after* submission of the case to the Supreme Court of Appeals of West Virginia are cited by reference to the "typescript record" ("T. R."), as paginated by the Clerk of the Circuit Court of Kanawha County, West Virginia, in preparing the record for this appeal.

and sale of natural gas at both wholesale and retail, in West Virginia and other States (R. 89).

United Fuel is a public service corporation. It is a "natural-gas company" under the Natural Gas Act (15 U.S.C.A. §§ 717-717w), subject to regulation by the Federal Power Commission, and a public utility under West Virginia law, subject to regulation by the Public Service Commission of West Virginia (R. 89).

The essentially interstate character of the natural gas industry is typified by United Fuel's operation.

The origin and destination of United Fuel's gas supply is depicted on Map Exhibit 133, a map published by the Federal Power Commission. It shows the path of the interstate pipelines bringing gas from Louisiana and Texas across Arkansas, Mississippi, Alabama, Tennessee, and Kentucky into West Virginia.

Ninety percent of United Fuel's sales of gas in West Virginia, both interstate and intrastate, follows these interstate routes in continuous streams from the Southwest (X 11)—some of it bought from Tennessee Gas Transmission Company ("Tennessee Gas") at several points in West Virginia, and the balance received from Columbia Gulf Transmission Company ("Columbia Gulf") in Boyd County, Kentucky (R. 95; MX 132). Three percent of United Fuel's sales in West Virginia is of gas produced from Kentucky and Virginia gas wells and imported into West Virginia, and the seven percent balance is produced in West Virginia (X 11).*

* These proportions of United Fuel's sales in West Virginia (90% Southwest, 3% Kentucky and Virginia, and 7% West Virginia) are more heavily Southwest than the entire gas supply entering United Fuel's system in the three States of Kentucky, Virginia, and West Virginia (compare X 2 with X 11). This is due to the fact that most of the West Virginia and Kentucky gas is *not* sold in West Virginia, but instead in Kentucky and Ohio (see MX 134 and 135).

The same Map Exhibit 133 shows how the gas so acquired by United Fuel flows on through the company's system for ultimate consumption in Kentucky, West Virginia, Ohio, Virginia, Maryland, Pennsylvania, New York, and the District of Columbia. In fact, barely 10% of the gas which United Fuel sells in West Virginia is later consumed in this State (R. 89-90; X 37; MX 138 through 152).

This description of the interstate movement of the gas typifies the entire period of 1957 through 1961 covered by the audit leading up to the Tax Commissioner's formal Reassessment (R. 93-94). It is also very similar to United Fuel's operations ever since 1944 (R. 142-43), when Southwest gas first became a part of the company's gas supply (R. 95).

All contracts between United Fuel and its interstate suppliers are fully regulated by the Federal Power Commission (R. 94-95; X 5 and 8). In the main, these contracts are long-term, to assure continuity of supply to the general public (R. 94). The Federal Power Commission has also issued formal certificates of public convenience and necessity authorizing the operation of all transmission pipelines and compressor stations and all underground storage fields, pipelines, and storage compressor stations owned by United Fuel and its major wholesale suppliers (Tennessee Gas and Columbia Gulf), "as well as the construction of such facilities as were built after the enactment of the Natural Gas Act in 1938." (R. 98.)

This appeal involves three "mainline" industrial sales, i.e., sales made direct from United Fuel's interstate transmission system and authorized pursuant to the provisions of Section 7(c) of the Natural Gas Act. The

mainline customers are E. I. du Pont de Nemours and Company ("Du Pont"), Elk Refining Company ("Elk Refining"), and Kaiser Aluminum and Chemical Corporation ("Kaiser"). The aggregate of the taxes sought to be imposed on United Fuel by reason of these three sales, for the "assessment period" of 1957 through 1961, amounts to $794,181.12 (MX 154, 156. and 157). The circumstances of each sale are of record.

The Mainline Industrial Sale to Du Pont

United Fuel and Du Pont entered into a Precedent Agreement (X 54) in March, 1956; the final Agreement (X 39), with a 20-year term, was dated November 7, 1956, and provided for the sale and delivery of gas to Du Pont's Belle Plant in Kanawha County, West Virginia. This plant has facilities for shipping by river and rail, and by tank trailers over the highways (R. 155).

Using natural gas as a basic raw material, the Belle Plant now manufactures 30 major products and a number of minor products (R. 155). The gas delivered by United Fuel is taken into the Belle Plant at the main transmission line pressure of 550 pounds per square inch, the pressure required by the Du Pont processes (R. 156-57).

Approximately 88% of the products of the Belle Plant is immediately shipped out of West Virginia for further processing; about 7% is shipped to Du Pont's Parkersburg (West Virginia) Plant for further processing before being shipped out of West Virginia; and the remaining 5% is sold to other chemical companies for use in their products. (R. 155.)

Before United Fuel could commence performance of its contract with Du Pont, Federal Power Commission

authorization was obtained by order issued September 18, 1956, in FPC Docket No. G-10658 (X 56).

Even before this, United Fuel had made long-term contract arrangements with Tennessee Gas, and Tennessee Gas had in turn consummated a similar gas acquisition program with its Southwest lessors and independent producers, based in part on United Fuel's contract obligation to furnish Du Pont's substantially constant gas requirements (R. 157).

The normal flow of gas sold to Du Pont, and other relevant details, are shown on Map Exhibit 154, which shows both the summer and winter periods.

The origin of all gas deliveries to Du Pont was 100% Southwest gas, purchased by United Fuel from Tennessee Gas in Kanawha County, and then transported southerly by United Fuel to the Kanawha County point of delivery to Du Pont (R. 157).

In the summer periods, the gas flowed continuously from the various producing wells in Louisiana and Texas to Du Pont at the mainline tap near the end of Transmission Line SM-88 in Belle (R. 158).

The gas to be sold to Du Pont in the winter months was stored for the summer from the same Louisiana and Texas supply in United Fuel's Storage Field X-52, about five miles northeast of Belle. In the winter periods, the gas was withdrawn from Storage Field X-52 as Du Pont required it. (R. 158.)

The Mainline Industrial Sale to Elk Refining

United Fuel's mainline sales of gas to Elk Refining go back more than 40 years under a series of industrial contracts. The current contract is Exhibit 42. (R. 158.)

All of the gas delivered to Elk Refining is used in its Falling Rock Refinery in Kanawha County, West Virginia, where it is commingled with gas from other sources, and used to fire steam boilers for the entire energy needs of the Refinery (R. 158-59).

The Falling Rock Refinery manufactures various fuel oils, gasolines, lubricating stocks, commercial waxes, and related products. (R. 159.) It accepts gas from United Fuel at the prevailing transmission line pressure (X 42).

The mainline industrial sale to Elk Refining preceded the enactment of the Natural Gas Act in 1938, and so the Federal Power Commission has never specifically issued a certificate. However, Section 7(c) of the Natural Gas Act provided for a "grandfather certificate" for all pre-existing jurisdictional facilities, which United Fuel obtained. (R. 159.)

The normal flow of gas sold to Elk Refining, and other relevant details, are shown on Map Exhibits 155 (summer period) and 156 (winter period). The summer period deliveries were West Virginia gas (MX 155). The winter period deliveries, however, are estimated to have been only 8% West Virginia pipeline gas, with 92% being storage gas from United Fuel's underground storage fields (MX 156). The storage gas was (MX 136) virtually all Southwest gas. (R. 159-60.)

The Mainline Industrial Sale to Kaiser

The Kaiser plant is located near the City of Ravenswood in Jackson County, West Virginia (MX 157). It is an integrated aluminum manufacturing plant, integrating two different types of plants at a single site. A reduction plant reduces or converts raw alumina, a bauxite ore derivative which is shipped to the Jackson

County plant, to pure aluminum by an electrolytic process. Then a fabrication plant fabricates molten aluminum into the desired solid shapes and forms, for sale as bulk metal or fabricated aluminum products of a wide variety. (R. 160.) United Fuel supplies the gas direct from its transmission pipeline at the pressures required by Kaiser (X 49).

Kaiser's major uses of the gas are for a series of industrial furnaces, other direct heat applications, and the firing of steam boilers, for various steps in the manufacturing processes (R. 160-61).

Before United Fuel could commence performance of its contract with Kaiser (X 57), Federal Power Commission authorization was required. By order issued October 13, 1955, in FPC Docket No. G-9070 (X 58), the Federal Power Commission issued a certificate of public convenience and necessity that authorized United Fuel to "construct and operate approximately six (6) miles of 10-3/4 inch natural gas transmission pipeline, designated as Line EM-63 * * *, together with appurtenant equipment", "for the purpose of transporting and selling natural gas primarily and directly to the Kaiser Aluminum and Chemical Corporation for industrial consumption in its aluminum fabricating plant now under construction" in Jackson County. The certificate was issued upon the express condition that deliveries of natural gas by United Fuel to Kaiser could not exceed 5500 Mcf per day. (R. 161.)

Kaiser and United Fuel negotiated a new contract dated October 1, 1957 (X 49), calling for deliveries of as much as 13,000 Mcf of gas per day. United Fuel obtained authorization for the sale of the increased quantity from the Federal Power Commission, by order

issued September 16, 1957, in FPC Docket No. G-9070 (X61).

Both initially and for the 1957 increase, United Fuel's long-term arrangements for Southwest gas were based in part on its contractual obligation to meet Kaiser's substantially constant gas requirements (R. 161-62).

The normal flow of gas sold to Kaiser, and other relevant details, are shown on Map Exhibit 157, which shows both the summer and winter periods.

The origin of all gas sold to Kaiser from 1959 through 1961 is estimated to have been 95% Southwest gas, 3%+ Kentucky gas, and 2%— West Virginia gas. This Southwest gas and Appalachian gas was brought together in separate continuous streams at United Fuel's Ceredo Compressor Station in Wayne County, West Virginia, where it was commingled, compressed, and then transported without interruption toward the point of delivery. (R. 162.)

In the summer periods, the gas sold to Kaiser flowed continuously from the various producing Southwest and Appalachian wells through the Columbia Gulf, Tennessee Gas, and United Fuel systems directly to the point of delivery to Kaiser at the mainline tap near the end of United Fuel's Transmission Line EM-63, about five miles southwest of Ravenswood. (R. 162.)

In the winter periods, the gas sold to Kaiser was withdrawn from Storage Field X-58, about ten miles northeast of Ravenswood, where it had been temporarily stored during the preceding summer months. (R. 162.)

In the years 1957 and 1958 (the first years of the Reassessment period), 100% of the gas delivered to Kaiser was Southwest gas (MX 157; R. 163).

The Stages and Manner in Which the Federal Questions Were Raised, and the Way in Which They Were Passed Upon

The case was submitted on stipulated materials. These consisted of a narrative stipulation (R. 76-203) and eight volumes of exhibits (X 1-131, and MX 132-159). The Commerce Clause questions now sought to be reviewed grew out of "Agreed Issue No. 10", reading as follows:

> "Does Tax Section 2d [that is, W. VA. CODE, c. 11, art. 13, § 2-d], in providing inter esse that 'The measure of this tax shall not include gross income derived from commerce between this state and other states of the United States.', thereby exclude from taxation under any Tax Section of the statute United Fuel's gross income from sales of gas under special industrial contracts directly from United Fuel's transmission pipelines to—
>
> (a) E. I. du Pont de Nemours and Company,
>
> (b) Elk Refining Company, and
>
> (c) Kaiser Aluminum & Chemical Corporation
>
> —in view of the particular facts, including the role of underground storage, involved in the sales and deliveries to each?" (R. 85.)

The opinion of the Circuit Court shows how the parties handled this issue:

> "The primary contention of the plaintiff [United Fuel] is that the exclusionary provision of the statute does not merely limit the application of the tax of Section 2d to sales which could be taxed without impinging upon the Commerce Clause of the Constitution, but that all sales in interstate commerce are thereby excluded. * * *

> "* * * However, judging from the [Tax Commissioner] defendant's 'pre-trial' brief, it was apparently not anticipated that the plaintiff's primary reliance would be that all sales in interstate commerce are thereby expressly excluded, and not merely those sales involving interstate commerce, the taxation of which would unduly burden interstate commerce. In other words, most of the authorities cited by counsel for the defendant [Tax Commissioner] stand for the proposition that a state may regulate or tax comparable sales, even though they involve interstate commerce". (Appendix A, Part Five, pp. 123a-124a; R. 251.)

After discussion of these positions, the Circuit Court first held that the three mainline industrial sales of Southwest and Kentucky gas were interstate commerce (Appendix A, Part Five, p. 125a; R. 252). Then the Circuit Court basically adopted United Fuel's primary position, and ruled in United Fuel's favor on the issue of taxability:

> "In light of the decision in Battle v. Baltimore & Ohio R. R. Co., [149 W.Va. 810, 143 S.E.2d 331 (1965), cert. denied, 384 U.S. 970 (1966),] supra, indicating, in my view, a broader application of the Commerce Clause, and of the decisions from other states, construing similar excluder clauses, and upon the clear mandate of the excluder of Section 2d, I am of opinion that the statute must be literally applied to exclude from the computation of the taxes, not only sales in interstate commerce which would, if taxed, clearly constitute an unreasonable burden thereon under the Constitution, but all gross income from any transaction in interstate commerce. * * * [Citations omitted.] Accordingly, having heretofore found that the transmission pipeline-sales involved in Agreed Issue No. 10 are sales involving inter-

state commerce, I am of opinion that Agreed Issue No. 10 should be answered in the affirmative." (Appendix A, Part Five, pp. 127a-128a; R. 254-55.)

The Tax Commissioner appealed the Circuit Court decision to the Supreme Court of Appeals of West Virginia under the provisions of W. VA. CODE, c. 11, art. 13, § 8.* In his Petition for Appeal, the Tax Commissioner urged that the Circuit Court had erroneously ignored Commerce Clause principles in ruling on Agreed Issue No. 10 (R. 8, 10).

On the constitutional question, the majority of the Supreme Court of Appeals of West Virginia joined in the Opinion by Calhoun, Judge (Appendix A, Part Two, pp. 66a-77a; 167 S.E.2d 920-25). This opinion, hereinafter styled "the Majority Opinion", attempted to dodge the Commerce Clause question raised and decided in the trial court, and appealed by the Tax Commissioner, by asserting that the federal question had not been presented—and then proceeded to hold that United Fuel's mainline sales were not commerce at all.

These are the steps in the reasoning of the Majority Opinion:

(1) *The Majority Opinion incorrectly stated that United Fuel had argued that the Commerce Clause question was not before the court* (Appendix A, Part Two, p. 67a; 167 S.E.2d at 920-21)—a grave misstatement of United Fuel's argument (Brief for the Plaintiff, March 25, 1968, pp. 154-55).

(2) *The Majority Opinion erroneously ruled that the parties were not entitled to address the question*

* United Fuel cross-appealed on other issues not here relevant, by specification in its brief under the procedure permitted under Rule XI of the Rules of Practice in the Supreme Court of Appeals.

of constitutionality, despite the trial court's recognition and disposition thereof. (Appendix A, Part Two, pp. 67a-68a; 167 S.E.2d at 921.)

(3) *The Majority Opinion stated that if the Commerce Clause issue were to be decided, the utility privilege tax might not constitutionally apply to the three mainline industrial sales.* ("I am of the opinion, as apparently was the trial court, that if it were held that the tax here in question represents a tax upon gross income derived from interstate commerce under the statute, it might with some reason be argued that, under the Baltimore and Ohio Railroad Company case, the tax is, as a matter of course, violative of the Commerce Clause." Appendix A, Part Two, p. 68a; 167 S.E.2d at 921.)

(4) *The Majority Opinion held that the statutory excluder of "gross income derived from commerce between this state and other states" is simply declarative of the Commerce Clause.* ("* * * merely represents, in my opinion, a legislative purpose to recognize fully the inhibition imposed upon the states by the Commerce Clause of the Constitution of the United States." Appendix A, Part Two, p. 72a; 167 S.E.2d at 923.)

(5) *Finally, and remarkably, the Majority Opinion held that the mainline industrial sales to Du Pont, Elk Refining, and Kaiser are not commerce at all, and thus can not be interstate commerce.* ("In my judgment, United Fuel as a natural gas company engaged in business in this state as a public utility, does not earn a single dime as 'gross income derived from commerce', either interstate or intrastate, in the sales of gas to these three industrial

consumers. It is not engaged in any business by which it earns or undertakes to earn a gross income from engaging in commerce as such. * * * Its gross earnings here in question are not derived from commerce." Appendix A, Part Two, pp. 73a-74a; 167 S.E.2d at 923.)

United Fuel's Petition for Rehearing, filed with the Supreme Court of Appeals of West Virginia on May 2, 1969, presented *inter alia* the same federal questions addressed in this Jurisdictional Statement, though in a slightly different form (T. R. 1675-76).

No written opinion accompanied the order denying (Appendix A, Part Four, p. 80a; T. R. 1704) United Fuel's Petition for Rehearing (T. R. 1673-77), notwithstanding the decisions of this Court that the mainline industrial sale of imported gas constitutes interstate commerce.

(e) THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Three reasons of substance underlie this appeal. *First*, the Majority Opinion rejects the primacy of this Court in defining the terms used in the federal Constitution. *Second*, the judgment below conflicts in its result with decisions of this Court and other federal and State courts. *Third*, the Majority Opinion foreshadows a fundamental enlargement in the State tax burden of basic industry in interstate commerce, over and beyond the constitutional limits established in prior decisions of this Court.

(i) The case is within the jurisdictional provisions relied upon and the cases cited to sustain the jurisdiction.

The appellate procedure set out in W. VA. CODE, c. 11, art. 13, § 8, establishes that the Supreme Court of Appeals of West Virginia is "the highest court" in West

Virginia "in which a decision could be had", within the meaning of 28 U.S.C. § 1257.

The judgment order (Appendix A, Part Three, pp. 78a-79a) became final on June 24, 1969, when the court refused United Fuel's Petition for Rehearing by order entered on that date (Appendix A, Part Four, p. 80a). *Market Street Ry. v. Railroad Commission*, 324 U.S. 548 (1945); *Chicago Great Western R. R. v. Basham*, 249 U.S. 164 (1919). Even though the judgment order remanded the case to the Circuit Court of Kanawha County, the explicit directions accompanying the remand preserve the finality of the appellate rulings: an appellate judgment is final where the order of remand leaves "nothing to be done but the ministerial act of entering judgment in the trial court." *Cole v. Violette*, 319 U.S. 581, 582 (1943); *Rio Grande Western Ry. v. Stringham*, 239 U.S. 44 (1915); *Mower v. Fletcher*, 114 U.S. 127 (1885).*

Despite the fact that the parties argued and the trial court dealt with the Commerce Clause questions under Agreed Issue No. 10 (*supra*, pp. 12-14), and despite the Tax Commissioner's presentation of the Commerce Clause questions in his Petition for Appeal to the Supreme Court of Appeals (*supra*, p. 14), the Majority Opinion ruled that no constitutional question was before it (*supra*, pp. 14-15, item 2), though it indicated the doubtful constitutionality of the tax on these mainline industrial sales (*supra*, p. 15, item 3).

Nonetheless, two lines of authority sustain this Court's

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* Even if the directions had been altogether omitted from the order of remand, the judgment would still be final, because "the facts have been stipulated" and the appellate court "passed on the issues which control the litigation", so that "there is nothing more to be decided." *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 73-74 (1946).

jurisdiction of United Fuel's appeal under 28 U.S.C. § 1257(2).

First, the fact of the matter controls. The presentation of federal questions, in short, is itself a federal issue which "this Court must determine for itself". *Allied Stores, Inc. v. Bowers*, 358 U.S. 522, 524 (1959). Even when some question of local practice may exist, the Court has rejected technical procedural objections to reach constitutional questions that have in fact been raised. *E.g., Staub v. City of Baxley*, 355 U.S. 313 (1958). Indeed, once an issue has been addressed by the parties and ruled upon by the trial court, an appellate decision which ignores the issue on appeal may amount to a denial of due process. *Cole v. Arkansas*, 333 U.S. 196 (1948).

Second, neither party could have foreseen that the Supreme Court of Appeals of West Virginia would attempt to dodge the Commerce Clause questions at the same time it said the statutory excluder was a declaration of constitutional law (*supra*, p. 15, item 4). The incongruity of such reasoning is heightened by the history of the trial court's ruling on the Commerce Clause questions (*supra*, pp. 12-14) and the Tax Commissioner's appeal therefrom (*supra*, p. 14). Under these circumstances, United Fuel is entitled to rely on its Petition for Rehearing (T. R. 1673-77) to the Supreme Court of Appeals. Where the state appellate court renders a decision that could not have been expected, and that unexpected holding itself raises a federal question, the surprised party has the right to raise the federal question on a petition for rehearing—because only then has the surprised party the opportunity to present the federal question. This rule sustained the Court's jurisdiction in such cases as *Cole v. Arkansas, supra; Brinker-*

hoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930); *Missouri ex rel. Missouri Insurance Co. v. Gehner*, 281 U.S. 313 (1930); and *Saunders v. Shaw*, 244 U.S. 317 (1917).

(ii) The Majority Opinion rejects the primacy of this Court in defining the terms used in the federal Constitution.

Pursuant to certificates of convenience and necessity issued by the Federal Power Commission under Section 7(c) of the Natural Gas Act (15 U.S.C.A. § 717f(c)), United Fuel has made mainline industrial sales of Southwest and Kentucky gas, direct from its interstate transmission system, to Du Pont, Elk Refining, and Kaiser.

The Majority Opinion holds that these transactions are not interstate commerce. It holds they are not commerce at all. (Appendix A, Part 2, p. 73a; 167 S.E.2d at 923.) This holding was technically limited to defining the phrase in W. VA. CODE, c. 11, art. 13, § 2-d, excluding from the utility privilege tax "Gross income derived from commerce between this state and other states of the United States". Therefore, the Majority Opinion asserted, constitutional definitions by the United States Supreme Court "are not directly in point, but are at most persuasive"—even though it went on to declare that the statutory excluder "merely represents, in my opinion, a legislative purpose to recognize fully the inhibition imposed upon the states by the Commerce Clause of the Constitution of the United States." (Appendix A, Part Two, pp. 69a, 72a; 167 S.E.2d at 922, 923.)

This amounts to a doctrine of judicial interposition by a State court. The "reasoning" applied in the Majority Opinion could be applied by any State court in

any case as a means of avoiding the inhibitions imposed upon the States by the Commerce Clause. That clause will become meaningless if a State is permitted to tax the gross receipts of interstate commerce through the simple device of declaring that it is not commerce at all.

As with the Commerce Clause, so with the rest of the Constitution. If the courts in 50 States can insulate local statutes and ordinances by parochial definitions of constitutional terms, the same type of insulation can be enacted by 50 State legislatures. The ramifications of separatism among the States are endless, and they are inimical to the federal system.

Commerce among the states, or commerce between the states, or interstate commerce, are peculiarly federal terms. They have *no* significance and *no* import except as rooted in U. S. CONST., art. I, § 8. Consequently, the use of such phrases by a State legislature in a statute like W. VA. CODE, c. 11, art. 13, § 2-d compels the conclusion that the legislature was using the words in the same sense as they are used in the federal Constitution—because this is the only sense there is for such words.

The "no commerce" holding of the Majority Opinion is palpable error. Whether "commerce" is defined in the ordinary business sense or in the sense of the federal Constitution, a sale of gas or any other commodity is commerce. "Whatever other meanings 'commerce' may have included in 1787, the dictionaries, encyclopedias, and other books of the period show that it included trade: business in which persons *bought and sold*, bargained and contracted. And this meaning has persisted to modern times." *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 539 (1944) (empha-

sis supplied). For historic definitions of "commerce" in both constitutional and business usage, *compare Carter v. Carter Coal Co.*, 298 U.S. 238, 298 (1936), *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 446-47 (1827), *and Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 229-30 (1824), *with* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 456 (1961), 3 A NEW ENGLISH DICTIONARY 677-78 (Oxford ed. 1888), *and* JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 1778)—all of which hold that sales are commerce.

As surely as they are commerce, the mainline industrial sales of Southwest and Kentucky gas are interstate commerce. This Court has twice held so on comparable mainline industrial sales, in *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329, 333 (1951), and *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U.S. 507, 513 (1947).

Even before these decisions, the courts of Florida and Missouri had come to the same conclusion. *Gay v. United Gas Pipe Line Co.*, 159 Fla. 659, 32 So.2d 600 (1947); *United Gas Pipe Line Co. v. Lee*, 154 Fla. 235, 17 So.2d 553 (1944); *State ex rel. Cities Service Gas Co. v. Public Service Commission*, 337 Mo. 809, 85 S.W.2d 890 (1935), *cert. denied*, 296 U.S. 657 (1936).

After the Court's *Panhandle Eastern* holdings, the courts of Illinois and Mississippi followed as a matter of course. *Mississippi River Fuel Corp. v. Hoffman*, 4 Ill.2d 468, 123 N.E.2d 503, *cert. denied sub nom. Wright v. Mississippi River Fuel Corp.*, 349 U.S. 935 (1955); *Natural Gas Pipeline Co. v. Illinois Commerce Commission*, 33 Ill.2d 214, 210 N.E.2d 490 (1965); *United Gas Pipe Line Co. v. Mississippi Public Service Com-*

mission, 241 Miss. 762, 133 So.2d 521 (1961); *Texas Gas Transmission Corp. v. Public Service Commission*, 241 Miss. 826, 133 So.2d 526 (1961).

The Majority Opinion rejected these authorities, and rejected this Court's primacy in defining constitutional terms. It should be reversed.

(iii) The judgment below conflicts in its result with decisions of this Court and other federal and State courts.

Though it sought to avoid the constitutional question as such, the Majority Opinion sustained in its effect a gross receipts tax on mainline industrial sales of gas, produced in other States and imported into West Virginia for sale direct from the interstate transmission pipelines.

This result is in direct conflict with the holdings of other courts, all of which proceed from the basic premise of *East Ohio Gas Co. v. Tax Commission*, 283 U.S. 465 (1931). In this case, the Court distinguished between the interstate commerce of the high-pressure transmission pipeline systems, and the essentially intrastate character of the low-pressure distribution systems from which nearly all utility customers receive gas. The Court held that Ohio might apply a gross receipts tax to all of the utility's sales from the low-pressure distribution system, whether the gas came from Ohio or not (283 U.S. at 472). Just as importantly, however, the Court indicated that a tax on gross receipts from operation of the interstate transmission system would *not* be constitutional (283 U.S. at 470)—a point entirely consistent with the earlier tax cases of *United Fuel Gas Co. v. Hallanan*, 257 U.S. 277 (1921) and *Hope Natural Gas Co.*

v. Hall, 274 U.S. 284 (1927), and the later tax cases of *State Tax Commission v. Interstate Natural Gas Co.*, 284 U.S. 41 (1931) and *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954).

Both Florida and Illinois have considered gross receipts taxes in relation to mainline industrial sales of imported gas. Both have ruled that such sales of imported gas, direct from the interstate transmission system to the industrial purchaser, are protected by the Commerce Clause from such a tax. *United Gas Pipe Line Co. v. Lee*, 154 Fla. 235, 17 So.2d 553 (1944); *Gay v. United Gas Pipe Line Co.*, 159 Fla. 659, 32 So.2d 600 (1947); *Mississippi River Fuel Corp. v. Hoffman*, 4 Ill. 2d 468, 123 N.E.2d 503, *cert. denied sub nom. Wright v. Mississippi River Fuel Corp.*, 349 U.S. 935 (1955).

The conflict between the result of the Majority Opinion and the Florida and Illinois holdings cannot be gainsaid, and should be resolved.

In *Ideal Cement Co. v. United Gas Pipe Line Co.*, 282 F.2d 574 (5th Cir. 1960), *vacated on procedural grounds*, 369 U.S. 134 (1962), the Fifth Court of Appeals appears to have gone even further in extending Commerce Clause protection to sales of imported gas for industrial purposes. Certainly its result conflicts with that of the case at bar.

The national disadvantages of judicial conflicts need not be elaborated. Throughout its history, the Court has taken the lead in explicating the harm done by such conflicts to the nationhood of one people in a federal system.

(iv) The Majority Opinion foreshadows a fundamental enlargement in the State tax burden of basic industry in interstate commerce, over and beyond the constitutional limits established in prior decisions of this Court.

West Virginia has a transportation privilege tax, and a consumers sales tax, and a use tax, and a corporate net income tax. W. VA. CODE, c. 11, arts. 12A, 15, 15A, and 24.

This appeal involves none of these. It involves the utility privilege under the Business and Occupation Tax, which is basically a privilege tax measured by gross receipts. W. VA. CODE, c. 11, art. 13, §§ 2, 2-d.*

Any appraisal of the effect of gross receipts taxes on interstate commerce requires study of the exhaustive analysis of Part V ("Gross Receipts Taxes") in Volume 3 of SPECIAL SUBCOMMITTEE, HOUSE COMM. ON THE JUDICIARY, STATE TAXATION OF INTERSTATE COMMERCE, H. R. Rep. No. 565, 89th Cong., 1st Sess. 1005-1114 (1965). This Report, hereinafter cited as "STIC", offers major support for plenary consideration of this appeal, which documents the pyramiding effect of gross receipts taxes.

At the time of this Congressional study, only eight States employed a gross receipts tax "of general applicability" like West Virginia's (STIC, at 1009). Twenty-five States, however, had so-called severance taxes,

* Apparently to avoid other Commerce Clause problems, some of the "privileges" are taxed on other bases than actual gross receipts. For example, W. VA. CODE, c. 11, art. 13, §2 prescribes several special rules for manufacturers and for producers of natural resources—apparently to conform to Commerce Clause limitations laid down in cases such as *Hope Natural Gas Co. v. Hall*, 274 U.S. 284 (1927). This decision limited an earlier version of West Virginia's gross receipts tax to the wellhead value of any gas transported by interstate pipelines out of West Virginia to other States.

which the Special Subcommittee pointed out were practically identical in effect to general gross receipts taxes, although limited to "natural resources or on the privilege of extracting or producing them or on their conservation" (STIC, at 1011-12). Included in the roster of States with gross receipts or severance taxes on the production of gas are all five—Louisiana, Texas, Virginia, Kentucky, and West Virginia—which contribute to United Fuel's overall gas supply (R. 95; STIC, at 1009, n. 2, and 1012, n. 16). Consequently, every cubic foot of the gas which United Fuel sold to Du Pont, Elk Refining, and Kaiser was subjected to gross receipts taxation at the point of production.*

The Supreme Court of Appeals of West Virginia has now ruled that mainline industrial sales of gas in interstate commerce are subject to a second layer of gross receipts taxation, at the rate of 3.9% of the gross income. No deduction is allowed on account of the basic cost of the gas to United Fuel, which cost included the severance-type gross receipts taxes already paid in Louisiana or Texas or Virginia or Kentucky. W. VA. CODE, c. 11, art. 13, §§ 1, 2, 2-d.

United Fuel's three mainline industrial customers are manufacturers (*supra*, pp. 7, 9, 9-10), and are thus subject to the manufacturers' gross receipts tax of W. VA. CODE, c. 11, art. 13, § 2-b. No deduction is allowed for the price paid United Fuel for the gas, including gross receipts taxes previously paid on account of production or severance, or on account of United Fuel's mainline industrial sale.

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* In recent years, a part of United Fuel's gas supply may have come from offshore Louisiana gas fields beyond the Louisiana jurisdiction. This would not be subject to a severance tax.

Virtually all of Du Pont's products are immediately transshipped out of West Virginia (*supra*, p. 7). The record is silent on the destination of the Elk Refining and Kaiser products—but if they stay in West Virginia, they ultimately become subject to the wholesalers' and then the retailers' gross receipts taxes under W. VA. CODE, c. 11, art. 13, § 2-c, without deduction on account of any embedded costs, including gross receipts taxes previously paid at any stage.

This Court has held from the beginning that the Commerce Clause "by its own force created an area of trade free from interference by the States." *Freeman v. Hewit*, 329 U.S. 249, 252 (1946). The facts of the case at bar validate the proposition, and suggest the powerful economic burden that a State's tax policies can lay on interstate commerce.

The Majority Opinion has been shown to conflict with decisions in other States on mainline industrial sales of gas in interstate commerce. More importantly, the entire case typifies the never-ending pressure by State taxing authorities to erode Commerce Clause principles, and to expand the power of the States to control the national economy by their parochial tax policies. The Special Subcommittee referred to this tendency, and suggested that one result is likely to be "an expansion in the area of interstate commerce of this form of taxation, with an accompanying increase in the incidence of multiple taxation." (STIC. at 1032.)

Even if the case at bar stood for nothing beyond the natural gas industry, it would be a case of substance. Industrial sales of gas now account for nearly two-thirds of the total national usage. FEDERAL POWER COMMISSION, 1968 ANNUAL REPORT 46 (1969). Mainline in-

dustrial sales, direct from the interstate gas transmission system, represent the bulk of the industrial sales in interstate commerce. In United Fuel's case, 85% of all industrial sales in 1961 were mainline sales (X 26, pp. 518-19). Finally, the mainline sales at transmission pressures involve sales to basic industry:

> "Some of the largest industrial markets are for electric generation, the chemical industry (including raw material use [as in United Fuel's sale to Du Pont]), the iron and steel industry, oil refinery processes [as in United Fuel's sale to Elk Refining], and the manufacture of paper and nonferrous metals [as in United Fuel's sale to Kaiser]." FEDERAL POWER COMMISSION, FORTY-FIFTH ANNUAL REPORT 115 (1966).

The Court's decisions, of course, can not be restricted to a single line of commerce. The issues presented in this appeal would appear to be of significance to all basic industry.

Respectfully submitted,

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